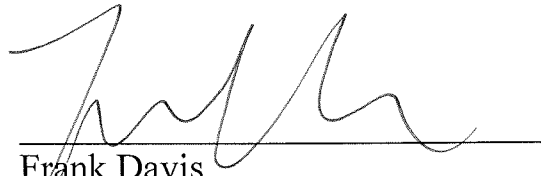


2. Katch Kan maintains its principal place of business and transacts business within this judicial circuit in accordance with the meaning of Section 10(f), and this Court has jurisdiction over this cause.

3. The Board's "decision and order" against Katch Kan is not supported by substantial evidence and is contrary to law.

WHEREFORE, Katch Kan respectfully prays that this Court review and set aside the Board's order and that Katch Kan receive any further relief to which it may be entitled.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frank Davis", written over a horizontal line.

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Dated: August 21, 2015

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

KATCH KAN USA, LLC,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR REVIEW

I certify that the foregoing Petition for Review was served by U.S. First
Class Mail on August 21, 2015, to the following:

Linda J. Dreeben, Deputy Associate General Counsel
Ruth E. Burdick, Deputy Associate General Counsel
Appellate and Supreme Court Litigation
1015 Half Street SE
Washington, D.C. 20570-0001



Frank Davis

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Katch Kan USA, LLC, and United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC. Case 16-CA-134743

August 4, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

On April 14, 2015, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below, and we shall substitute a new notice to conform to the Order as modified.²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that in the course of recounting Tanner Siems' testimony about an August 8 meeting, the judge stated that certain remarks were made by Nolan Todd when Siems testified that they were made by the Respondent's salesman/attorney. This error does not affect our disposition of this case.

² We shall modify the judge's recommended Order in accordance with our decisions in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), and *J. Picini Flooring*, 356 NLRB No. 9 (2010), and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and to the Board's standard remedial language, and in accordance with the Board's decision in *Durham School Services*, 360 NLRB No. 85 (2014).

In the amended complaint, the General Counsel requests that Siems be reimbursed for "all search-for-work and work-related expenses regardless of whether Siems received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period." Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Ishikawa Gasket America, Inc.*,

ORDER

The National Labor Relations Board orders that the Respondent, Katch Kan USA, LLC, San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Tanner Siems full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Tanner Siems whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the remedy section in the judge's decision, as amended herein.

(c) Compensate Tanner Siems for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Siems, it will be allocated to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its San Antonio, Texas facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 16,

337 NLRB 175, 176 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 8, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 4, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Tanner Siems full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Tanner Siems whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

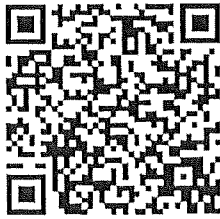
WE WILL compensate Tanner Siems for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Siems, it will be allocated to the appropriate calendar quarters.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Tanner Siems, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

KATCH KAN USA, LLC

The Board's decision can be found at www.nlrb.gov/case/16-CA-134743 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

KATCH KAN USA, LLC



Jonathan Elifson, Esq., for the General Counsel.
Jacob Monty, Esq., Mario Castillo, Esq., and Nancy Molina, Esq. (Monty & Ramirez, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on February 25 and 26, 2015, in San Antonio, Texas.¹ The amended complaint herein, which issued on February 11, 2015, was based upon an unfair labor practice charge and an amended charge that were filed on August 15, 2014,² and September 26. The complaint alleges that on July 28 employee Tanner Siems engaged in protected concerted activities with other employees by engaging in a work stoppage demanding that the Respondent rescind changes in the employees' schedules and wages and to confirm the rescission in writing, and that the Respondent discharged Siems on August 8 for engaging in this action. The Respondent defends that he was discharged because he refused a work assignment that he had previously agreed to perform.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

The Respondent is in the business of servicing oil drilling rigs; it provides a containment system that is employed to catch and recycle the oil base during the drilling process. On July 28, at the conclusion of a regular safety meeting held with the employees, Stephen Ramsey, the Respondent's South Texas regional manager, announced a change in compensation which would have resulted in the employees' pay being reduced by as much as 50 percent. This resulted in the employees refusing to go out on their regular assignments until, later that day, the Respondent agreed to modify the changes so that they were not as drastic. On August 8, Siems was discharged. Counsel for the General Counsel alleges that he was discharged due to his participation with the other employees in their protected concerted activities on July 28 of protesting the wage reduction. The Respondent defends that he was discharged because he refused a

work assignment in Saudi Arabia that he had previously accepted.

III. THE EVENTS OF JULY 28

Up until July 28, the employees were compensated on the basis of 7 on, 7 off, with a minimum of 40 hours of pay for the 7 days off. In addition, during the 7 on days, they often worked overtime. Ramsey, the principal spokesperson for the Respondent at this meeting, was a supervisor at the facility where Siems was employed.³ Also testifying about this meeting were employees John Barrows, Gavin Wheeler, and Siems. The Respondent conducted safety meetings every Monday. Present on behalf of the Respondent was Ramsey, John Canales, assistant superintendent, and Mike Cresetelli, a salesman. All the regular employees, about 10 in number were present. Barrows, who had been employed by the Respondent as a lead installer for over 2 years until he was terminated by the Respondent, testified that at the conclusion of the safety meeting Ramsey stated that he had an announcement to make about some changes in the employees schedule and compensation. Their schedule was going to be changed from 7 on 7 off, to 4 on and 4 off, and the 40-hour minimum pay for the 40-off hours was going to be eliminated. A lot of the employees, including Barrows and Siems, spoke up and said that it was such a drastic change that they should have been notified about it earlier. Ramsey then walked out of the office and the employees, who "were all in shock," remained to talk about it and they all agreed not to return to work until their schedule was renegotiated. Shortly thereafter, Cresetelli asked Barrows to go to a rig and Barrows told him that he couldn't go because his partner was not at the office and Cresetelli told him to find somebody else. Barrows handed the paperwork to Siems, who said that he wasn't going under those circumstances: "I want the schedule back." They then moved to the front of the office and Canales told Barrows, "I need you to go to this rig," and Barrows told him that he refused to take the job until they renegotiate the schedule. Ramsey returned and asked them what they were doing and they told him that they refused to work until their schedule was renegotiated. Ramsey then made some telephone calls and when he returned he told them that they could have their schedule back to 7 on, 7 off, but without the 40-hour guarantee for the off week. Barrows, Siems, and some of the others then said that they wanted some documentation. Ramsey asked, "You don't trust my word?" The employees said that after what was done they couldn't trust his word, and Siems said: "Your word doesn't mean shit." Ramsey did not say anything, but had a surprised look on his face. He made more phone calls and again asked Barrows to go on the rig and he agreed and went to the rig and the other employees returned to work.

Siems, who was employed by the Respondent as a lead installer for in excess of 2 years, testified that at the conclusion of the safety meeting on July 28, Ramsey announced that their schedule would be reduced from 7 on, 7 off, to 4 on, 4 off, with no 40-hour guarantee for the off week. He and about four other employees responded by saying that the change would basically

¹ Counsel for the General Counsel's Motion to Strike Portion of Respondent's Brief is granted as proposed Exhs. H and Q were not received in evidence and are not relevant as well.

² Unless stated otherwise, all dates herein refer to the year 2014.

³ Ramsey was terminated by the Respondent in January 2015 for "Careless discharge of duties."

cut their salary in half and Ramsey said, "That's the way it's going to be for now." The employees then gathered on the porch of the facility and Canales approached them and asked who was ready to go to work on a rig. The employees all agreed that they would not go on a rig until the terms were changed and Canales and Ramsey walked away. About 15 minutes later they returned and asked if the employees were still refusing to go to work and they all agreed that they were. At about that time, employee Wheeler arrived for work. Later that day, Ramsey asked the employees what it would take to get them to return to work and they all agreed that it should, at least, go back to 7 on, 7 off, and Ramsey said that he would call the Respondent's headquarters. About 5 minutes later he returned and said that the Company would agree to 7 on, 7 off, but without the 40-hour guarantee. Siems, followed by about three other employees told him that they wanted it in writing and Ramsey went to make another phone call. When he returned, he said that the Company agreed to put it in writing and that "we had his word that we would get it." Siems told him that "his word didn't mean shit at this time." Ramsey did not respond, but looked angry and said that they would have it in writing by the end of the day. Ramsey then asked if anybody would go to the rig, and Barrows said that he would, and he and the other employees returned to work.

Wheeler, who had been employed by the Respondent as a lead installer for 3 years before he resigned in October, testified that he was not present for the safety meeting on July 28 or for the initial announcement by Ramsey, but when he arrived the employees were on the porch and they told him what Ramsey said about the change in schedules to 4 on, and 4 off. All of the employees were angry, and when Canales asked for volunteers to work on a rig, all of them refused. He walked away, and when he returned he again asked for volunteers to work a rig and, again, all refused to go. He told them that if that was their final decision, "that they needed to stick together." About 15 minutes later, Ramsey asked if they were all refusing to work and they said that they were. Ramsey returned to the office and when he came out he asked what it would take to get them to take the jobs that needed to be done and the employees said that the 7 on, 7 off schedule would have to be reinstated and he said that in order to do that he would have to speak to Nolan Todd, the Respondent's general manager. After making a telephone call, he returned to say that Todd agreed that they could keep their 7 on, 7 off schedule. Either Siems or Barrows asked for it in writing and Ramsey said, "You have my word that it will be done" and Siems said, "No offense, but your word doesn't mean shit." Ramsey did not respond, but his face turned red and he seemed angry. Ramsey returned to the office to make a phone call and returned to say that the Respondent agreed to put it in writing. At that point, Barrows agreed to go to the rig, the other employees returned to work and the meeting ended.

Ramsey testified that at the conclusion of the safety meeting, he told the employees that he had an announcement to make that affected their schedule and pay. He told them that they would go from a 7-and-7 rotation to a 4-and-4 rotation with the 40 hours of pay for their off week eliminated. He testified: "Everybody was pretty much in shock and there were some comments flying around the room," but he could not specifical-

ly remember what was said and by whom. He went to lunch and, while there, he was told that Barrows had refused to go on a job, so he called Todd and told him that he wanted to discharge Barrows for refusing to take the job and to go down the list and fire everyone until somebody agreed to go, but Todd "... advised me not to do that. He said, let's make a deal with the guys, see if they will accept the loss of the forty hour pay on their days off if we will continue the seven-and-seven rotation." Ramsey then returned to the facility and met with the employees on the porch and said, "I've spoken to Nolan, he understands your concerns, we cannot afford to pay you 40 hours for your time off, no one does that, that's just not something we're able to bargain on, but we will keep your schedule 7-and-7." An employee (he testified that he was 90-percent certain that it was Siems) asked if they could get the promise in writing and he said that he would get it for them, but he cannot remember anybody commenting on the value of his word, and he was not upset that he was asked to put the promise in writing. After that, "the guys became more calm" and he asked Barrows if he would go out on the job, he said that he would, and he left.

IV. WORK IN SAUDI ARABIA

Todd testified that the Respondent obtained a contract with Aramco, the Saudi Arabian Oil Company to supply and maintain its equipment in Saudi Arabia; however, the number of employees that needed to go to Saudi Arabia, as well as the date that they were to begin work there, changed from July to September, to November and, eventually, to February 2015, although the equipment was shipped to Saudi Arabia in September. Originally, four employees were to go sometime in about August, but that date changed to late September and, eventually, to February 25, 2015, when one employee traveled to Saudi Arabia. However, four employees traveled to Canada for training for the job on September 14; the plane tickets for this trip were purchased on August 25. Todd testified that only one employee went to Saudi Arabia in February: "Because that's who they requested at this time." The change in dates was not the Respondent's decision, but Aramco continued to change the dates of arrival and the number of employees needed. He testified that as Aramco is the largest oil producer in the world, the Respondent was at its mercy. Because it was such an important job, when he was initially told that four employees would be needed, he told Ramsey to pick his best employees for the job. By email to Todd dated July 17, Ramsey stated, *inter alia*:

As of today I have committed four of my installers to the Saudi project, and I understand that they will be relieved of duty at STS within one or two weeks. These four are John Canales, Tanner Siems, Michael Salazar and David Salazar.

In early August, Todd received the "green light" for the project and immediately called Ramsey to get the people ready.

On August 20 and 25, Andrea Katen, the Respondent's senior HR generalist, wrote to the participants in the Saudi Arabia job. Each letter contains five paragraphs as well as a description of the compensation for the project. The sole difference be-

KATCH KAN USA, LLC

tween the two letters is contained in the first paragraph of the letters. The first letter states:

Thank you for volunteering to participate in the Saudi Aramco project in Saudi Arabia. Your time on this project will be on a 28 on 28 off rotation. The project will last approximately 90 days or so. The start date of this project will be September 8, 2014. The estimated rig up date is between Sept. 15th-31st and is dependent on the operator. We will have firm travel and project dates soon.

The August 25 letter states:

Thank you for volunteering to participate in the Saudi Aramco project in Saudi Arabia. Your time on this project will be on a 28 on 28 off rotation. The project will last approximately 90 days or so. The start date of this project will be September 8, 2014. The estimated rig up date is between Sept. 15th-31st and is dependent on the operator. Your travel arrangements have been made. You will be departing San Antonio Monday Sept 8th, 2014, going to Edmonton for training. You will return to San Antonio on Friday the 12th. Your travel to Saudi will then be communicated to you once we have a firm project start date.

Ramsey testified that in late June Todd told him to assemble a crew of four or five employees "willing to go" to Saudi Arabia. "Todd said that the job would be financially beneficial to the employees, but did not give any details on the compensation at that time." He primarily chose experienced employees and within about 2 weeks he had four employees "committed" to go, including Siems. At that time, he was in a "frenzy" hiring employees to replace these four employees. The evidence establishes that Respondent made written job offers to eight individuals at about this time: four as lead installers at \$19 an hour, and four as junior installers at \$15 an hour. Only one of the lead installer job offers is dated (August 20, and signed as accepted by the employee on the same day) and one is not signed as accepted or dated by the proposed employee. The other two lead installer job offers were to be effective on August 7, and were signed as accepted by the employees on that date. The junior installer job offers were also undated but were signed as accepted on August 25 and 25, September 22 and 24.

Prior to offering the job to Siems, Ramsey asked Wheeler, who told him that he thought about it, but that it wouldn't work for him. In his discussion with Siems in about late June, he told him that the Company was looking for volunteers to go to Saudi Arabia and asked if he was interested in going. Siems said he was interested, but wanted to think about it. He asked about the details of the job-departure date, pay scale, and living conditions, but Ramsey told him that at that time he didn't know what the conditions would be. After Ramsey learned more about the job, he told Siems that it would be a 28-day rotation, and that they would be paid an amount while they were working, and a lesser amount while back at the shop waiting on a call. He testified that he does not recall whether he ever told him what the wage rate would be on the job. Although Siems

was "initially . . . on the fence" about the job, over the next couple of weeks, during about two more conversations, "his commitment became more definitive," although Ramsey could not recollect what was said or when it occurred. As to whether Siems expressed any reservations about going, Ramsey testified: "I don't remember him. . . I know he wanted to know the details. But I can't remember specifically anything he said . . . to that respect."

Q. And when...during each of those conversations with him, was he definitive about wanting to go to Saudi Arabia, or was he . . .

A. Initially, he was on the fence. But once we started processing his passport and visa, I felt that, you know, we were firming up the decision.

Q. And at any time did you tell him that he needed to go to Saudi Arabia?

A. I had . . . an email so I don't remember the exact date. But it would have been, say, two weeks . . . I'm going to say two weeks prior to his termination date . . . I actually received a text message from him where he expressed his reservations. And that would have been after the wage change announcement. So, after the wage change announcement, he backed out.

The next time he discussed it with Siems was on a Friday morning, when he received a call from Todd saying that he needed the men to be on a plane to Canada from training on Monday. He called the four men and when he spoke to Siems he said, "We've received the start date and I need you to be ready to travel on Monday." Siems replied, "Well, I'm not going." Ramsey told him, "If you turn down this duty assignment, I'm going to terminate you." Siems said, "Well, I'm not going to Saudi," and Ramsey told him that he was fired. The employees did not leave for Canada on that Monday; they left several weeks later.

Siems testified that Ramsey first asked him to go to Saudi Arabia on July 11; he said that the Company was going to send a few employees to Saudi Arabia, and would he be willing to go. Siems answered: "If the terms were right and I had time to think about it." Ramsey responded, "That's all I need to know." The next conversation on the subject occurred on July 14, when he asked Ramsey if he knew any more details about the job and he said that he didn't, other than it was supposed to be at the end of August. On July 16, as he was loading his truck, Ramsey told him that he was one of the employees chosen to go to Saudi Arabia; Siems asked him if he knew any more about the terms and conditions of the job and he said that he didn't, and Siems responded that he still wanted to think about it. On July 21, Ramsey told "us" that they had to get their passports and Siems said that he would, but he wanted to know the terms and conditions of the trip prior to saying that he would go, and Ramsey said that was fine. On the following day he went to speak to Todd and asked him if he knew any of the specifics of the trip, and he said that all he knew was that it was supposed to be 14 days on, 14 days off and roughly \$250 to \$500 a day. Siems said that he still wanted time to think about it. Siems

then went to get a passport, and while on the way, he called Todd and told him that he didn't feel that it was good for him to go, so he didn't think that he would do it; Todd responded that was fine and that they could talk about it. When he returned to the office that day he left a message for Todd to call him, but he never did. Siems testified that at the conclusion of the discussions on July 28, after the installers returned to work, Ramsey told him that he had chosen him to go to Saudi Arabia because of his work ethic, and that as "changes were coming," he didn't want him to lose any money. Wheeler was present with him at the time, and Siems answered that he still didn't want to go. Ramsey had an "angry look" and simply said, "[O]kay." On August 4, Siems sent the following email to Ramsey:

Steve, I appreciate the opportunity to work overseas and selecting me out of all employees. But I am sending this to inform you I will no longer be able to go because of personal family matters. Once again thank you for offer the chance to go and sorry for any inconvenience.

On August 8, Ramsey called Siems and told him that he needed him and the others to be ready to fly to Canada on Monday. Siems responded that he had already told him that he didn't want to go, and Ramsey said that he would discuss it further with Todd and get back to him. Up to that point he had never been told that he was required to go. Later that morning he emailed Ramsey, stating: "Steve, I decided not to go overseas because of filling [sic] unsafe and for personal Family reasons." Siems then went to the Company's office and met with Todd. He told him that Ramsey called him about the Saudi Arabia trip even though he had told him that he no longer wanted to go. Todd said that he was told that Siems verbally agreed to go, and Siems said that he had never signed anything and had "... never verbally agreed that I was a hundred percent going." Todd said that getting his passport was his verbal agreement to go and Siems responded that they could take the cost of the passport out of his pay. Todd said that they had already replaced him with new employees and Siems asked if the Company was doing this because he was in favor of the Union, and Todd said that it was not his support or nonsupport of the Union, and that he would discuss the matter further with Ramsey. A couple of hours later, Ramsey called him and asked if he was still unwilling to go and he said that he was, and Ramsey said that they could talk about it on Monday at work. However, that evening he missed a call from Ramsey and when he called him back, Ramsey said that he really needed him to go and asked if he was still unwilling to go. When Siems said that he had already told him and Todd that he didn't want to go, Ramsey said that he was terminated.

Wheeler testified that after Ramsey told the employees on July 28 that Todd agreed that the Company would put the 7 on, 7-off agreement in writing, and the employees returned to work, Siems asked Ramsey if he found anybody to replace him on the Saudi Arabia job, but Ramsey did not respond and walked to the back of the office toward the storage room. A minute or two later, Ramsey called Siems in the back to speak to him. Wheeler did not hear the entire conversation between Ramsey and Siems, but he heard Ramsey tell Siems that Saudi

Arabia would be good for him and that he should have a "better adjusted attitude" about the situation. Siems replied that he still didn't feel safe going there and Ramsey said that they had already paid for his passport and Siems said that if it was about the money, they could take it out of his pay. That was the extent of what he heard.

Barrows testified that in about the middle of July he received a phone call from Ramsey, who told him that he had a great opportunity for him; he had been selected to go to Saudi Arabia to work on a rig for the Company. He responded that he would go only if the wages were right. Ramsey said that a handful of employees had been selected to go and that he would call him again when he knew more. A few weeks later he asked Ramsey about it, and Ramsey told him that he wasn't one of the employees selected to go. Wheeler testified that in late June or early July, Ramsey asked him if he were interested in going to Saudi Arabia, and he answered that he wouldn't object to it, but wanted to know more about it. Ramsey said that he thought that Wheeler, Siems, David, and Mike Salazar would be the employees going, and that he would tell him more about the job when he found out. About a week or two later, Ramsey approached him and asked if he would be upset if he did not get chosen to go to Saudi Arabia and Wheeler said that he would not be upset. Ramsey said that he wanted to send John Canales because he had a DWI conviction pending and, to keep him employed, he could send him overseas, because his driving record would not matter there.

Ramsey testified that while the four employees going to Saudi Arabia were supposed to go in August, only one eventually went, and in February 2015. These changes were the result of decisions by Saudi Aramco, not by the Respondent. A group of employees did go, however, to Kenya, in December, and Canales was one of the employees chosen to go. Because of a terrorist attack on Kenya the day prior to when he was to leave, he refused to go and he was terminated.

V. ANALYSIS

It does not require any case citations to establish that Siems and his fellow employees were engaged in protected concerted activities on July 28. In fact, the Respondent does not appear to dispute that fact. On that day, after being told by Ramsey that their method of compensation was being changed from 7 on, 7 off, to 4 on, and 4 off, with the 40-hour guarantee eliminated, which would reduce their pay by an estimated 50 percent, they complained to Ramsey about the change and refused to go out on jobs until the change was reversed. Although Ramsey wanted to fire the employees who refused to report to their job, Todd advised him not to do that, and none of the employees were discharged or disciplined for refusing to report to their assigned job. Eventually, the Company relented and reinstated the 7 on, 7 off schedule, but without the 40-hour guarantee and, at that time, the employees returned to work. As all, or almost all, of the employees were involved in this protest of the reduction of their hours and wages, it was clearly concerted and as they did not engage in any unlawful conduct, it was protected as well. The issue herein is whether Siems was discharged on August 8 for his participation in this protest, including his comment to Ramsey that his word didn't mean shit, or was he

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discharged simply because he refused to go to Saudi Arabia. This issue is to be judged under the guidelines of *Wright Line*, 251 NLRB 1083 (1980). Under that test, the counsel for the General Counsel must initially make a prima facie showing sufficient to support the inference that the protected conduct engaged in on July 28 was a "motivating factor" in the Respondent's decision to discharge Siems. If that has been established, the burden then shifts to the Respondent to establish that it would have discharged him regardless of the protected activities of July 28.

I find that counsel for the General Counsel has satisfied his initial burden. The installers were understandably unhappy with the change in compensation announced by Ramsey at the July 28 meeting, and they manifested their unhappiness by refusing to work until it was reversed or, at least, partially reversed. Siems was an active participant together with the other installers in the July 28 confrontation, and I credit the testimony of Siems, Barrows, and Wheeler that, when Ramsey asked the employees to take his word that they would return to a 7 on, 7 off schedule, Siems told him that his word didn't mean shit. I do not credit Ramsey's testimony that he does not remember anyone commenting on the value of his word, and that he was not upset that the employees told him that wanted the promise in writing. I also credit the employees that after Siems' comment to Ramsey, his face turned red and he looked angry, which is a not unreasonable response to being told that his word meant shit. As counsel for the General Counsel has satisfied his initial burden, the final issue is whether the Respondent has satisfied its burden that it would have discharged Siems even absent the events of July 28.

Where there is a conflict, I credit Siems' testimony over Ramsey. I found Siems' testimony to be credible and believable. Although Ramsey was fired by the Respondent since the events in question, I do not believe his testimony that he could not recollect Siems saying that his word did not mean shit and that he was not upset that he was asked to put his promise in writing. It appears to me that he would remember that statement and that he would be angry at the employee who said that his word was worthless.

Ramsey first asked Siems if he was interested in the Saudi Arabia job sometime between late June, Ramsey's testimony, and July 11, Siems' testimony. From the first request to the final request on August 8, Siems never said that he would be willing to go; in fact, Ramsey's testimony about his responses was quite vague. When he was first asked, Siems said that he would be willing to go if the terms were right and he had time to think about it. In the following two conversations, Ramsey could not be more specific about the terms of the job and Siems said that he still wanted to think about it. On about July 22, Siems agreed to get a passport, but still wanted to know the terms of the trip before agreeing to go and Ramsey replied that was fine. On July 22, Todd told him some of the terms of compensation and scheduling and he again replied that he still

wanted time to think about it. After obtaining a passport, he called Todd and told him that he didn't feel that it was good for him to go so he didn't think that he would do it and Todd responded that was fine and that they could talk about it. At the conclusion of the July 28 meeting, Ramsey told him that he was chosen to go to Saudi Arabia and Siems replied that he still didn't want to go. On August 4, Siems sent Ramsey an email clearly stating that he would not go, and yet on August 8, Ramsey called him and told him to be ready to go to Canada on the following Monday as if Siems had never sent him the August 4 email. As this evidence establishes that even if Siems did not specifically state prior to August 4 that he would not go to Saudi Arabia, it is clear that he never agreed to go and that prior to August 8 neither Ramsey nor Todd said that he had to go. The first time that he was told that he had to go was on August 8, 4 days after his email to Ramsey that he would not go. I find that the unmistakable inference from these facts is that the events of July 28 caused the Respondent to change its position on Siems going to Saudi Arabia and demand that he go at a time that they knew that he did not want to go.

Reinforcing this finding that Siems' refusal to go to Saudi Arabia was used as a pretext to the real reason, his actions at the July 28 meeting, is the fact that the Respondent was not affected, at all, by his refusal. Siems was told just prior to his discharge to be ready to leave for Canada for training on Monday, yet the plane tickets for the flights to Canada were not purchased until August 25, and the employees did not leave for Canada until September 14. No evidence was produced to establish that the Respondent purchased airplane tickets for the employees to travel on August 11. Although I credit the testimony that the delays were dictated by Saudi Aramco, rather than the Respondent, it is clear that on August 8 there were no definite travel plans for employees and they didn't leave until 5 weeks later. Clearly, the Respondent was not prejudiced by Siems' refusal to go. I therefore find that Siems was discharged on August 8, not for his refusal to go to Saudi Arabia, but for the protected concerted activities that he participated in on July 28, in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by discharging Tanner Siems on August 8, 2014, due to his protected concerted activities.

THE REMEDY

The Respondent having discriminatorily discharged Siems on August 8, 2014, it must offer him reinstatement and make

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him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I shall also order the Respondent to file a special report with the Social Security Administration allocating Siems' backpay to the appropriate calendar quarters and to compensate him for any adverse income tax consequences of receiving his backpay in one lump sum.

Upon the foregoing findings of fact, conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Katch Kan USA, LLC, San Antonio, Texas, its officers, agents, successors and assigns, shall

1. Cease and desist from discharging or otherwise discriminating against its employees in retaliation for their protected concerted activities, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Tanner Siems full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits that he suffered as a result of discharging him in the manner set forth in the remedy section of this decision.

(b) File a special report with the Social Security Administration allocating Siems' backpay to the appropriate calendar quarters and compensate him for any adverse income tax consequences of receiving his backpay in one lump sum, as prescribed in *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Siems, and within 3 days thereafter notify him, in writing, that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in San Antonio, Texas copies of the attached notice

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 8, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 14, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities, and WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Tanner Siems immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the discharge of Siems, and WE WILL, within 3 days thereafter, notify him that this has been

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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done and that the discharge will not be used against him in any way.

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The Administrative Law Judge's decision can be found at www.nlr.gov/case/16-CA-134743 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

